

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1022-CR

Cir. Ct. No. 2014CF213

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE E. VOLK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County:
RAYMOND S. HUBER, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Eugene Volk appeals a judgment convicting him, after a jury trial, of operating a vehicle with a prohibited alcohol concentration, as a tenth offense. Volk raises a single issue on appeal. He argues that the circuit court erred in denying his pretrial suppression motion because the police officer who stopped his vehicle lacked reasonable suspicion to do so. We reject Volk’s argument and affirm the judgment of the circuit court.

¶2 At the hearing on Volk’s suppression motion, the State elicited testimony from the officer who conducted the traffic stop, Deputy Chad Repinski. Repinski testified that, in the early morning hours of June 21, 2014, he was driving southbound on Highway 22 in Waupaca County when he saw a vehicle in front of him “weaving within its lane” and “cross the centerline at one point.” Repinski described the weaving as “bouncing from fog line to centerline.” He testified that the point where Volk’s vehicle crossed the center line was on a curve near Speer Road. Repinski testified that crossing the center line is a traffic violation, and that he stopped Volk’s vehicle because of the weaving, the crossing of the center line, and the time of night. Repinski further testified that, in preparation for the hearing, he had watched video footage taken by his dash camera that showed Volk’s vehicle cross the center line.

¶3 Volk requested that the circuit court review the dash camera video. The court agreed to do so, and set a continuation date. At the continued hearing, the court denied Volk’s suppression motion. The court stated that it had viewed the video several times and observed some periods where Volk’s vehicle was weaving within the lane and some “significant stretches where there appeared to be no problem with [the] driving.” The court noted that there was a “time or two” where the vehicle may have crossed the line, though not near a curve. The circuit court found Repinski’s testimony credible, and concluded that, under the totality

of the circumstances, the stop was proper. Volk now appeals, arguing that the State failed to establish reasonable suspicion to justify the traffic stop.

¶4 A police officer may conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Reasonable suspicion requires an officer to have specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop. *Id.* Whether reasonable suspicion exists is a question of constitutional fact. *Id.*, ¶10. We uphold the circuit court’s factual findings unless those findings are clearly erroneous; however, we independently apply those facts to constitutional principles. *See id.*

¶5 Volk argues on appeal that his “minimal weaving within his own lane of traffic” was insufficient to give rise to reasonable suspicion to support the traffic stop. Volk argues that weaving within one’s own lane of traffic, without more, is insufficient to support an investigative stop, citing *State v. Post*, 2007 WI 60, ¶2, 301 Wis. 2d 1, 733 N.W.2d 634.

¶6 In *Post*, the supreme court stated:

When viewed in isolation, the individual facts that Post was weaving across the travel and parking lanes, that the weaving created a discernible S-type pattern, that Post’s vehicle was canted into the parking lane, and that the incident took place at night may not be sufficient to warrant a reasonable officer to suspect that Post was driving while intoxicated.... However, such facts accumulate, and “as they accumulate, reasonable inferences about the cumulative effect can be drawn.”

Id., ¶37.

¶7 In *Post*, at around 9:30 p.m. the officer observed the defendant’s vehicle moving back and forth in its lane. *Id.*, ¶¶4-5. In the instant case, it was even later—around 2:26 a.m.—when Repinski observed Volk’s vehicle weaving. Additionally, in this case as in *Post*, weaving within a single lane was not the only factor contributing to the officer’s suspicion that the driver had committed a crime or traffic offense. As Repinski testified, it was a combination of the late hour, the vehicle’s weaving, and the vehicle’s crossing of the center line that led the officer to stop Volk.

¶8 Volk asserts that the circuit court never made a finding that Repinski’s testimony was credible or supported by the video evidence. However, the record, when read as a whole, demonstrates otherwise. The circuit court stated: “I cannot say that Officer Repinski’s testimony was incredible, and therefore I’m going to find the stop was appropriate.” The court further stated, after indicating that the court had viewed the video several times, that the court believed the center line “could have very well been crossed.” Although the court did not explicitly use the words “I find,” it is apparent that the court found the officer’s testimony to be credible and not inconsistent with the video evidence. *See State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) (“A trial court is not required to recite ‘magic words’ to set forth its findings of fact.”); *see also State v. Walstad*, 119 Wis. 2d 483, 515, 351 N.W.2d 469 (1984).

¶9 Generally, it is not the province of the reviewing court to determine issues of credibility. *State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). We have no reason to conclude, based on the video footage or otherwise, that the circuit court’s determination regarding Repinski’s credibility or the weight the court gave to the officer’s testimony regarding reasonable

suspicion should be overturned. The circuit court, therefore, properly denied Volk's suppression motion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

